Filed 11/3/10 P. v. Nagapetian CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ASATOUR NAGAPETIAN, Defendant and Appellant.	F057717 (Super. Ct. Nos. 04CM4530 & 08CM0142) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos and Louis F. Bissig, Judges.

Han N. Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

In case No. 04CM4530, a jury convicted Asatour Nagapetian (appellant) of forgery and commercial burglary. In case No. 08CM0142, appellant pled no contest to willfully failing to appear for his sentencing hearing in case No. 04CM4530. In both cases, the trial court sentenced appellant to a total prison term of three years eight months. On appeal, appellant contends his three-year sentence for case No. 04CM4530 was improperly imposed and that the matter must be remanded for resentencing. We agree the trial court based the three-year sentence on a mistaken interpretation of the plea agreement in case No. 08CM0142, as limiting its sentencing discretion in case No. 04CM4530, and will vacate appellant's sentence and remand the matter for the trial court to exercise fully its sentencing discretion. We also agree with appellant's contention, which respondent concedes, that the imposition of concurrent terms for the forgery and burglary in case No. 04CM4530, violated Penal Code,[1] section 654, and therefore, on remand, the court should stay one of the terms it imposes for those counts. Finally, we reject appellant's contention that he is entitled to additional presentence credits.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2004, appellant went to Badasci Tire Company in Hanford and used a forged check to purchase 20 large truck tires. Appellant was subsequently charged, in case No. 04CM4530, with forgery (§ 470, subd. (d); count I) and commercial burglary (§ 470, subd. (d); count II). In November 2007, a jury found appellant guilty as charged and the matter was set for sentencing in December 2007. Appellant failed to appear for sentencing and the court issued a bench warrant for his arrest.

Appellant returned to court in December 2008. In January 2009, appellant was charged in case No. 08CM0142 with the willful failure to appear for his sentencing

---

1 Further statutory references are to the Penal Code unless otherwise specified.

hearing in case No. 04CM4530 (§ 1320.5; count I). It was further alleged that appellant committed the offense while on release from custody (§ 12022.1).

On February 18, 2009, appellant entered a plea agreement in case No. 08CM0142, under which appellant pled no contest to count I, and the section 12022.1 allegation was dismissed. The plea agreement provided for appellant to receive an eight-month sentence "which would run consecutive to *the time* [he] would be serving" in case No. 04CM4530, which was still pending sentencing at the time appellant entered his plea in case No. 08CM0142. (Italics added.) During the hearing, the trial court questioned appellant, in relevant part, as follows:

> "THE COURT: Well, has anybody made any other promises to get you to plead?
>
> "THE DEFENDANT: No.
>
> "THE COURT: We talked about this being an eight-month consecutive sentence to *the time* in the other case, but other than that, anything else?
>
> "THE DEFENDANT: No." (Italics added.)

On April 24, 2009, appellant appeared for formal sentencing in both case No. 04CM4530 and case No. 08CM0142, and the defense attorneys assigned to each case were present. Before the court pronounced sentence, the following discussion took place:

> "MR. ELIA [Defense counsel for case No. 04CM4530]: Your Honor, I believe there is an agreement in this case that he would receive three years on my case and eight months on Mr. Gupton's case, and the only issue for sentencing are the time credits, which I'd like to speak to.
>
> "THE COURT: I'm sorry. You said three years on your case and Mr. Gupton's case was?
>
> "MR. ELIA: Eight months.
>
> "MR. GUPTON [Defense counsel for case No. 08CM0142]: Subordinate terms.

"THE COURT: Three years eight months.… [S]o for the record we're all on the same page, it's three years eight months and it's been sent out, basically, to do the calculation of time credits and the like.

"MR. ELIA: That's correct."

After a discussion of the custody credits issue, the following exchange occurred:

"THE COURT: Okay.

"In 04CM4530, the Court's going to -- well, even if it was a stipulated sentence, and I'm not sure it was a stipulated sentence, *I think the attorneys have previously agreed that he would get this when the plea was entered on the 08-case, that he would get the three years eight months consecutive; is that correct,* Mr. Gupton?

"MR. GUPTON: That's correct, your Honor. It's my recollection and comports with my notes in the file.

"MR. ELIA: That's correct.

"THE COURT: Okay.

"And the reason being is on the 04-case it actually went to trial with the recommendation, and then in absconding and then brought back with the 08-case, so that's where it became *a package deal* at that point.

"Okay. Because of of that, according to the Rules of Court then the Court need not state any further reasons to impose sentence.

"The Court in 04CM4530 will deny probation, sentence the defendant to a term of three years in the state prison.… [¶] … [¶] The term -- actually there [were] two terms, Count I and Count II; the Court is sentencing him to three years on Count I, a three-year term on Count II but that would be concurrent to Count I." (Italics added.)

The court then sentenced appellant to eight months in case No. 08CM0142, and ordered the sentence to run consecutively to the three-year sentence imposed in case No. 04CM4530.

DISCUSSION

I. The Matter Must Be Remanded for Resentencing

Appellant seeks a remand for a new sentencing hearing based on the trial court's imposition of a three-year sentence for case No. 04CM4530. We agree remand is required. It is clear from the record that the sentence imposed on April 24, 2009, was not the result of a proper exercise of trial court discretion. The court's sentence was based on the mistaken belief, shared by the defense attorneys, one of whom was not present at the time of the plea, that appellant *agreed* to be sentenced to three years in case No. 04CM4530, as part of the plea agreement he entered in case No. 08CM0142. No such agreement is evidenced by the plea agreement appellant entered on February 18, 2009.

As set forth above, appellant agreed to be sentenced to eight months in case No. 08CM0142. He also agreed that the sentence would run consecutively to *the time* he received for case No. 04CM4530. However, there was no agreement as to the *amount* of time he would receive in case No. 04CM4530. Thus, the plea bargain did not limit the court's sentencing discretion with respect to case No. 04CM4530, and the court was not limited to imposing a three-year, upper-term sentence, as it mistakenly believed.[2]

A remand for resentencing in case No. 04CM4530, therefore, is appropriate for the trial court to exercise its sentencing discretion without considering the mistaken interpretation of the plea agreement in case No. 08CM0142. "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to

---

[2] In so concluding, we necessarily reject respondent's strained interpretation that the plea bargain entered in case No. 08CM0142 "contemplated a specific sentence" in case No. 04CM4530. As respondent acknowledges, "the record does not reveal an explicit agreement" and we decline to infer one based on factors that were not expressly discussed by court and the parties, such as appellant's criminal history, which respondent describes as "extensive."

exercise its sentencing discretion at a new sentencing hearing. [Citations.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

We note, however, that the trial court properly sentenced appellant to eight months for the willful failure to appear. As per the plea agreement, whatever sentence the court exercises its discretion to impose in case No. 04CM4530, shall be ordered to run consecutively to the eight-month term already imposed in case No. 08CM0142.

In light of our conclusion that the trial court misinterpreted the plea agreement in case No. 08CM0142, as restricting its sentencing discretion with respect to case No. 04CM4530, and that remand is the appropriate remedy, we need not consider appellant's other arguments in support of his request for a remand.

II. The Concurrent Sentence for Second Degree Burglary Violated Section 654

Appellant contends, respondent concedes, and we agree that the evidence showed that the forgery (§ 470, subd. (d); count I) and second degree burglary (§ 459; count II) in case No. 04CM4530, were committed incident to a single objective (i.e., to obtain the tires without paying for them) and, therefore, the trial court's imposition of a concurrent sentence for count II violated section 654.[3] The sentencing ranges for forgery and second degree burglary are the same, with the longest punishment for both being three years. (See §§ 18, 461, subd. (b), 473.) Therefore, on remand, the trial court should stay one of the terms it imposes for the forgery and burglary counts pursuant to section 654.

III. Appellant Is Not Entitled to Additional Section 4019 Credits

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal

---

3 Section 654, subdivision (a), states in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

When appellant was sentenced in April 2009, the court calculated appellant's conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody. Applying this amendment retroactively, appellant argues he is entitled to additional days of conduct credit. We disagree and conclude the amendment applies prospectively only.[4]

Under section 3, it is presumed that a statute operates prospectively "'absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application]. [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) The Legislature neither expressly declared, nor does it appear by "'clear and compelling implication'" from any other factor(s), that it intended the amendment operate retroactively. (*Id*. at p. 754.) Therefore, the amendment applies prospectively only.

---

4 We decide this case according to our opinion in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, which is currently before the California Supreme Court, along with its companion case, *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 4019.

DISPOSITION

The matter is remanded for resentencing in accordance with the views expressed in this opinion. The trial court is to forward a copy of the new abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

_____
HILL, J.

WE CONCUR:

_____
CORNELL, Acting P.J.

_____
DAWSON, J.